91-713

No. _____

In The

Supreme Court of the United States

October Term, 1991

GERARDO ACUNA CASTILLO, et al.,

Petitioners,

versus

SHELL OIL COMPANY, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is an order remanding a diversity case to state court, because of the presence of a resident defendant in violation of 28 U.S.C. §1441(b), reviewable despite the proscription of review in 28 U.S.C. §1447(d)?

2. Is the presence of a resident defendant, in violation of the statutory restriction on removal of diversity cases in 28 U.S.C. §1441(b), a "defect in removal procedure" under the remand statute, 28 U.S.C. §1447(c)?

LIST OF PARTIES

The following individuals were respondents in the mandamus proceedings below and are Petitioners here:

Gerardo Acuna Castillo
Amado Alfaro Gomez
Benito Alvarez Alvarez
Mario Alvarez Sandi
Rodolfo Andrade Granados
Valentin Angulo Angulo
Roberto Araya Lazo
Ananias Arias Delgado
Ali Arias Ortega
Jose Antonio Arias Soto
Guido Franciso Arias Vega
Albino Del Carmen Badilla Perez
Nicolas Baltodano Munoz
Rito Peralta Baltodano
Douglas Gregorio Barrantes Bran
Luis Alberto Barquero Quesada
Neftali Bermudez Quiros
Leandro Bonilla Bran
Edgar Brenes Serrano
Luis Antonio Briceno Herrera
Maximilliano Bustos Rodriguez
Racito Campos Garcia
Fernando Campos Jimenez
Carlos Campos Venegas
Ambrosio Carrillo Perez
Olger Cartin Araya
Arsenio Castillo Zuniga
Elidio Concepcion Pineda
Rigoberto Cordero Alvarado
Pablo Inocente Corea Fernandez
Jesus Marta Chaves Mata
Carlos Luis Chaves Salas

LIST OF PARTIES – Continued

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Victor Delgado Chaves
Martin Rafael Dia Chavarria
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Eulogio Espinoza Obando
Ronulfo Espinoza Quesada
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Vincente Flores Valverde
Pompillio Fonseca Martinez
Tito Gaitan Leal
Gilberth Garcia Cubillo
Rosendo Garcia Montes
Antonio Garita Ramirez
Javier Godinez Montero
Braudilio Gomez Gomez
Edwin Reyes Gomez Gutierrez
Luis Angel Gonzalez Castillo
Maneul Gonzalez Montero
Ramior Granados Cortes
Gerardo Guevara Gomez
Eliecer Guevara Mora
Sergio Guevara Mora
Gilberto Guevara Pearson
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LIST OF PARTIES – Continued

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Olman Leal Rodriguez
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Jose Antonio Leandro Manfredi
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Lorenzo Lopez Moxsy
Casimiro Lopez Sandoval
Flor Lopez Zuniga
Luis Alberto Lozano Portobanco
Juan Mata Zamora
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Otilio Mesen Bermudez
Raul Miranda Mendez
Olman Miranda Roman
Salvador Molina Narvaez
Jose Montiel Castrillo
Alejandro Mora Mora
Juan Miguel Mora Zumbado
Jose Efrain Moya Solano
Gerardo Murillo Porras
Pedro Obregon Castrillo
Jose Daniel Obregon Perez
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LIST OF PARTIES – Continued

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Juan Pablo Porras Izaba
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Roberto Ramirez Lobo
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Juan Luis Ramirez Rojas
Santana Ramirez Rojas
Orlando Ramirez Vasquez
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Oscar Rojas Cordoba
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Freddy Rosales Silva
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Alvaro Vega Rodriguez
Donato Rodriguez Salas
Oscar Carmen Bermudez Solera
Hernan Valverde Roman
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Bisai Fernandez Delgado
Noe Marenco Iglesias
Mario Pena Pena
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LIST OF PARTIES – Continued

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Francis Melendez Melendez
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Rodrigo Esquivel Aguilar
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LIST OF PARTIES – Continued

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Carlos Roberto Guzman Navarro
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Miguel Bran Barrantes
Manuel Jose Jimenez Barrantes
Trinidad Calero Calero
Efrain Moya Campos
Vicente Juan Castrillo Castrillo
Edgar Alfaro Castro
Francisco Granados Cartin
Gerardo Anchia Chavarria
Antonio Jesus Redondo Chavarria
Luis Rodriguez Chaves
Angel Miguel Jimenez Delgado
Reyes Diaz Diaz
Nelson RoJas Esquivel
Francisco Espinoza Espinoza
Abiu Corrales Fernandez

LIST OF PARTIES – Continued

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Edwin Mendez Gonzalez
Edwin Quiros Guevara
Villanuel Gutierrez Gutierrez
Alban Arias Herrera
Ovidio Rafael Cambronero Jimenez
Misael Rosales Jimenez
Maria Jose Rodriguez Madriz
Antonio Zamora Mata
Guillermo Zamora Mata
Leonel Fonseca Medina
Ricardo Zamora Medina
Manuel Jose Diaz Mendoza
Tomastisidro Garita Monge
Gerardo Espinoza Mora
Javier Vazquez Mora
Guadalupe Mosquera Mosquera
Jose Munoz Munoz
Angel Rafael Villegas Munoz
Angel Rafael Fuentez Nunez
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Antonio Angel Trejos Perez
Macario Jose Jimenez Picado
Roger Izaba Porras
Jacinto Izaba Porras
Hernan Saenz Prado
Freddy Espinoza Quesada
Rosendo Ramirez Ramirez
Alvaro Vega Rodriguez
Norman Araya Rojas
Freddy Romero Rojas

LIST OF PARTIES – Continued

Jesus Enriquez Rosales
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Nemecio Torres Torres
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Manuel Rodriguez Araya
Tito Gonzalez Lopez
Miguel Zuniga Jiron
Santiago Caravaca Moreno
Juan Jose Guzman Munoz
Alberto Gaspar Silva Obando
Jose Ayestas Paguaga
Ubaldo Juarez Ruiz
Wilbert Perez Salamanca

Honorable James DeAnda, Chief Judge, United States District Court for the Southern District of Texas

Honorable Kenneth M. Hoyt, Judge, United States District Court for the Southern District of Texas

LIST OF PARTIES – Continued

The following corporations were petitioners below and are Respondents here:

Dow Chemical Company
Shell Oil Company
Castle & Cooke, Inc.
Dole Fresh Fruit Company
Standard Fruit Company
Standard Fruit & Steamship Company
Occidental Chemical Corporation

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No. _____

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners Gerardo Acuna Castillo, et al., respectfully pray that a writ of certiorari issue to review the judgments and opinions entered below by the United States Court of Appeals for the Fifth Circuit on May 28, 1991.

OPINIONS BELOW

This is a petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review two decisions of that court. They are reported at 932 F.2d

1518 and 932 F.2d 1523, and are reprinted in the Appendix at 1-26. The opinions of the district courts are unreported and are reprinted in the Appendix at 27-36.

JURISDICTION

The two cases below were filed by Petitioners in state court in Harris County, Texas. They were removed to the United States District Court for the Southern District of Texas on the basis of diversity of citizenship under 28 U.S.C. §1332(a). Both cases were remanded to state court.

On May 28, 1991, the Fifth Circuit granted writs of mandamus to overturn the orders of remand. Timely petitions for rehearing were denied on July 29, 1991.

The jurisdiction of this Court to review the judgments of the Fifth Circuit is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

28 U.S.C. §1447. Procedure after removal generally.

. . .

(c) A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs, and any actual expenses, including attorney fees, incurred as a

result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the state court. The state court may thereupon proceed with such case.

(d) An order remanding a case to the state court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the state court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

STATEMENT OF THE CASE

This petition seeks a writ of certiorari to review two judgments of the United States Court of Appeals for the Fifth Circuit. Both cases involve claims removed to federal court and then remanded by the district courts. The relevant facts and proceedings below are largely the same, and each case presents the same questions here. The decisions by the Fifth Circuit are reported separately as *In re Shell Oil Co.*, 932 F.2d 1518 (5th Cir. 1991), and *In re Shell Oil Co.*, 932 F.2d 1523 (5th Cir. 1991). They will be referred to here as *"Shell I"* and *"Shell II."*

In *Shell I*, 165 Costa Rican plaintiffs filed product liability claims in a joint petition in the district court of Harris County, Texas. Each plaintiff alleged that he had been rendered sterile as a result of occupational exposure to a pesticide manufactured by certain defendants and used or supplied by others. Two of the manufacturers of the pesticide, Shell Oil Co. and Occidental Chemical

Corp., have their principal places of business in Texas, and Shell has its world headquarters in Harris County.

The case was removed to the United States District Court for the Southern District of Texas on the basis of diversity jurisdiction. Thirty-four days after the filing of the notice of removal, plaintiffs moved for remand on the ground that under 28 U.S.C. §1441(b), diversity cases are not removable if any defendant is a citizen of the forum state. Chief Judge DeAnda granted remand, rejecting the defendants' contention that Shell and Occidental had been fraudulently joined to defeat removal.

In *Shell II*, six groups of Costa Rican plaintiffs, totalling 171 claimants, filed petitions in district court in Harris County between August of 1988 and June of 1989. Each of the six cases likewise was removed to federal court on diversity grounds on various dates between September of 1988 and August of 1989. Three of the cases were removed prior to November 19, 1988, the date of an amendment to 28 U.S.C. §1447(c), and three after. On January 9, 1990, the six removed cases were consolidated before the Honorable Judge Kenneth Hoyt.

On May 3, 1990, plaintiffs in the consolidated case moved for remand on the basis of the presence of a local defendant (Shell was a defendant in this case, but Occidental was not). Defendants resisted on the ground that Shell had been fraudulently joined, and did not claim that the remand motion was untimely. On June 26, 1990, plaintiffs' motion for remand was granted, with Judge Hoyt holding that fraudulent joinder had not been shown.

Defendants filed a motion for reconsideration on July 6, 1990, and four supplements to this motion were filed

through September 28, 1990. On November 30, 1990, a fifth supplement raised, for the first time in the case, the argument that plaintiffs' remand motion had not been timely filed. Defendants argued that the presence of a local defendant, in violation of 28 U.S.C. §1441(b), is a "defect in removal procedure," and that under amended 28 U.S.C. §1447(c), motions for remand on the ground of such defects must be made within 30 days of removal. Judge Hoyt denied the motion for reconsideration on December 14, 1990.

Defendants then filed petitions for writs of mandamus in the Fifth Circuit seeking to overturn the orders of remand by Chief Judge DeAnda and Judge Hoyt. The petitions made the same contention, and also argued that if the remand motions were untimely, remand was therefore impermissible, and that review of the remand orders was therefore not prohibited by 28 U.S.C. §1447(d). The Fifth Circuit accepted these contentions, granted the petitions, and vacated the remand orders. Petitions for rehearing and suggestions for rehearing en banc were denied.

REASONS FOR GRANTING THE WRIT

There is a stark and irreconcilable conflict between the Fifth Circuit's view of what a "defect in removal procedure" is and the view of other Circuits, as well as considerable disagreement among the district courts. Part II, *infra*, details the conflict and urges the Court to resolve it. Aside from this issue, however, this Court should grant certiorari and reverse the decisions below, for they

fly in the face of several of this Court's precedents concerning the settled rule against reviewability of remand orders, and open a large new amount of such orders to appellate review.

I. The Fifth Circuit's Holding That Remand Orders on Standard Grounds Are Reviewable Conflicts with Decisions of This Court.

The court of appeals held that because the motions for remand below were filed more than 30 days after removal, Petitioners waived their right to seek remand. Petitioners sought remand on the ground that the presence of local defendants prevented removal of diversity cases under 28 U.S.C. §1441(b). The district courts agreed and, rejecting defendants' claims of "fraudulent joinder," remanded the cases.

The Fifth Circuit held, however, that the district courts had erred by even considering the local-defendant issue, since the presence of a local defendant is a "defect in removal procedure" under amended 28 U.S.C. §1447(c) which must be raised within 30 days of removal. The district judges had reached the opposite conclusion, finding the remand motions timely. App. 27.[1]

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[1] Because defendants did not raise the 30-day argument in *Shell II* until several months after remand had been ordered, there is no mention of a timeliness issue in the district court's opinion granting remand in that case. Defendants did raise the argument, however, prior to Judge Hoyt's denial of defendants' motion for reconsideration, thus giving him an opportunity to consider it, see *Shell II*, 932 F.2d at 1528, and reject it.

Since the remands did not correctly apply §1447(c)'s definition of removal procedure, the Fifth Circuit reasoned, they were reviewable. The conclusion was reached despite §1447(d), which provides that remand orders are not reviewable by appeal or otherwise.[2]

This result simply is wrong under several of this Court's decisions, each of which reaffirm the same point: even if a remand order is plainly erroneous, it cannot be reviewed.

The court of appeals rested its holding on the one decision by this Court carving out a limited exception to the rule of nonreviewability. Petitioners will discuss that exception, after setting out the established authority holding even mistaken remands immune from review. This Court should grant certiorari and reverse, not only as an exercise of its supervisory function to correct important errors in the application of federal procedure, but also to undo a new rule which will require appellate courts to evaluate large new numbers of remand orders.

A. The Conflict

This Court has made it clear that even erroneous remands are not reviewable. In *Volvo Corp. v. Schwarzer*, 429 U.S. 1331 (Rehnquist, Circuit Justice 1976) then-Justice Rehnquist, acting as Circuit Justice, considered an application for a stay of a remand order on the ground that the order was unauthorized. Noting that §1447(d) bars review of remands, then-Justice

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[2] The section contains an exception for civil rights cases which is irrelevant here.

Rehnquist rejected the argument that since the remand was in error it could be reviewed:

> Applicant's position would mean that any allegedly erroneous application of §1447(c) would be reviewable by writ of mandamus, leaving the §1447(d) bar extant only in the case of allegedly proper applications of §1447(c), a reading too Pickwickian to be accepted, and contrary to the clear language of *Thermtron*.

Id. at 1333, citing *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976). *Thermtron* is discussed below.

On the heels of *Volvo Corp. v. Schwarzer* came *Gravitt v. Southwestern Bell Telephone Co.*, 413 U.S. 723 (1977). There, a case was removed from Texas state court to the U.S. District Court for the Western District of Texas. The district judge initially denied a remand motion, but later granted a second remand motion when it became known that one of the defendants had made a judicial admission in an unrelated case that it was headquartered in Texas. The Fifth Circuit issued a writ of mandamus, directing the district court to vacate its order of remand and assume jurisdiction, holding that the judicial estoppel doctrine which compelled remand should have been governed by federal rather than Texas law, and thus that remand was improper. *In re Southwestern Bell Telephone Co.*, 535 F.2d 859 (5th Cir.), *modified on rehearing*, 542 F.2d 297 (5th Cir. 1976).

This Court reversed. Even in the face of an erroneous remand, the order "was plainly within the bounds of §1447(c) and hence was unreviewable by the Court of Appeals, by mandamus or otherwise. . . . *Thermtron* did

not question but re-emphasized the rule that §1447(c) remands are not reviewable." *Gravitt*, 430 U.S. at 723-24.

The same point was made again in *Briscoe v. Bell*, 432 U.S. 404, 413 n.13 (1977), in which this Court succinctly stated that "[w]here the order is based on one of the enumerated grounds, review is unavailable no matter how plain the legal error in ordering the remand."

In the present cases, the district judges believed that local defendants are not "defects in removal procedure." The Fifth Circuit – in conflict with other courts as described below – believed that conclusion to be erroneous. The above cases make plain, however, that *whether or not the district judges were right, their orders cannot be reviewed, as they indisputably were made on recognized grounds*. The lower opinions simply are in irreconcilable conflict with *Volvo*, *Gravitt* and *Briscoe* on this point and should be summarily reversed.

The Fifth Circuit relied exclusively on *Thermtron*, *supra*. That case does not make the conflict go away.

B. *Thermtron* Does Not Resolve the Conflict.

In *Thermtron*, a case filed in Kentucky state court was removed to the United States District Court for the Eastern District of Kentucky. Almost a year after removal, the district court remanded the case. The court conceded the existence of diversity, but ordered remand because of a crowded federal docket and the lack of a showing of local prejudice against defendants. The Sixth Circuit denied a petition of mandamus on the basis of §1447(d)'s proscription of review.

This Court reversed and granted the writ. The Court noted that there was no dispute to the propriety of federal jurisdiction:

> Neither the propriety of the removal nor the jurisdiction of the court was questioned by respondent in the slightest. . . . So far as the record reveals, it has not been questioned in this case that the cause is between citizens of different States, that it involves a claim of over $10,000 exclusive of interest and costs, that it is within the so-called diversity jurisdiction of the District Court and that it could have been initially filed in the District Court pursuant to 28 U.S.C. §1331. It also seems common ground that there is no express statutory provision forbidding the removal of this action and that the cause was timely removed in strict compliance with 28 U.S.C. §1446.

Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336, 343-44 & n.8 (1976).

The sole reason for remand, then, was the district court's heavy caseload. Such discretionary considerations, of course, are not permissible bases for remand: "[A]n otherwise properly removed action may no more be remanded because the district court considers itself too busy to try it than an action properly filed in the federal court in the first instance may be dismissed or referred to state courts for such reason." *Id.* 423 U.S. at 344. A case may only be remanded for grounds set forth in 28 U.S.C. §1447(c), the statute authorizing remand for lack of jurisdiction. Hence, the *Thermtron* Court held, the bar against review of remand orders in §1447(d) only applies to orders authorized by §1447(c). The two subsections must be read together, and because the district court

"remanded a properly removed case on grounds that he had no authority to consider, he exceeded his statutorily defined power; and issuance of the writ of mandamus was not barred by §1447(d)." *Id.* at 351.

Whether remand orders are reviewable, then, turns on whether they are authorized. The Fifth Circuit has held that the orders below were based on an incorrect reading of §1447(c) – that is, the district courts erred in construing the phrase "removal procedure." Petitioners are at a loss to explain, however, how this is anything but an "allegedly erroneous application of §1447(c)" held unreviewable in *Volvo* and the other cases of this Court. The court of appeals does not cite, let alone distinguish, these cases.[3]

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[3] The Fifth Circuit also ignored two of its own recent opinions which are at odds with the result reached. In *In re Wilson Industries, Inc.*, 886 F.2d 93, 95 (5th Cir. 1989), the court stated:

> The principle to which *Thermtron* speaks is that if a district court premises remand upon a ground not authorized by statute, such as the court's crowded docket, mandamus will lie. If the lower court's mistake rests on a misinterpretation of the remand statute, the extraordinary remedy is not appropriate.

In *Richards v. Federated Department Stores, Inc.*, 812 F.2d 211 (5th Cir. 1987), in which it appeared that defendant had never received a copy of the remand motion, the court held:

> The *Thermtron* court does not say that we cannot review orders purporting to remand [under §1447(c)] on certain grounds, or for certain faults; for constitutional infirmities, but not for statutory ones; it says that we cannot review them *at all*. There it ends.

Id. at 211 (emphasis in original).

Thermtron does not resolve the conflict between the rulings below and *Volvo*, *Gravitt* and *Briscoe*, for *Thermtron* is a different kind of case. The sense of that decision is that where a district judge remands for a wholly discretionary, unauthorized reason, some review mechanism must be able to correct it. To remand because of a crowded federal docket, as the district judge did in *Thermtron*, is no different from a court deciding to remand all personal injury cases, or all odd-numbered cases, or all cases removed on Fridays. The present cases, on the other hand, are ones where the district judge perhaps misconstrued, but certainly applied, a standard ground for remand: the presence of a resident defendant in a diversity case. *Thermtron* in no way opened remands made on such grounds, even if erroneous, to review.

Indeed, *Thermtron* itself reminds that remand orders entered on legitimate bases are insulated from scrutiny regardless of their correctness. *Id.* at 351 (to prevent protracted litigation of jurisdictional issues, "Congress immunized from all forms of appellate review any remand order issued on the grounds specified in §1447(c), whether or not that order might be deemed erroneous by an appellate court."). The type of order reviewable under *Thermtron* concerns remands made without reference to any basis whatsoever. "The exception recognized in *Thermtron* is quite narrow and probably limited in application to unusual situations, such as that presented in that case." 14A C. Wright, A. Miller and E. Cooper, *Federal Practice & Procedure* §3740 at 595-96 (West 1985).

Again, Petitioners believe the decisions below plainly cannot coexist with *Volvo*, *Gravitt*, and *Briscoe* and so ought to be summarily reversed. The Court may wish,

alternatively, to grant certiorari and use the case to articulate clearly what type of remands are and are not reviewable. Even though Congress made district courts the final arbiters of removability, the Fifth Circuit's new rule opens vast new numbers of remands to review. The Court should correct a mistake with such potential for mischief.

C. This Court Should Grant Certiorari to Correct the New Rule Announced by the Fifth Circuit Greatly Expanding Review of Remand Orders.

With the following passage, the court of appeals made many orders of remand newly reviewable:

> When Congress amended §1447(c), it deleted the reference to "improvident removal" while simultaneously adding a requirement that motions to remand based on "any defect in removal procedure" be made within 30 days. These changes reflect a congressional intent to delete improvident removal as an unreviewable basis for remand, at least when a motion based on such improvident removal is made outside the 30-day time limit. This leaves remand orders for lack of subject matter jurisdiction as the only clearly unreviewable remand orders. In the instant case, the district court based its remand order on §1441(b) and not on lack of subject matter jurisdiction. While this basis may have been unreviewable under old §1447(c) as an "improvident removal," it is not unreviewable under the amended §1447(c).

In re Shell Oil Co., 932 F.2d 1518, 1520 (5th Cir. 1991) (Shell I) (footnotes omitted). In a footnote to this passage, the

court stated that remands based on timely motions raising procedural defects "arguably" would be unreviewable. *Id.* at n.5.

Suddenly, then, any remand order on any other ground other than lack of subject matter jurisdiction is reviewable, at least in the Fifth Circuit. One immediately obvious area of new appellate review is in cases turning on the meaning of "removal procedure." According to the court of appeals, any remand order involving that ground for remand – certainly any order construing its meaning – is reviewable. As detailed in Part II, there is already a split in the circuits, and substantial disagreement among the district courts, as to the meaning of this phrase, and so the courts of appeal will have to review many such cases.

This Court should grant certiorari to decide whether there has been an expansion of appellate review of remands, and if so, to delineate clearly the new boundaries of review. The Fifth Circuit cited no legislative history to support its finding of "congressional intent" to expand review. To the contrary, any number of authorities might be cited for the proposition that Congress has given district courts the last word on removability. E.g., *United States v. Rice*, 327 U.S. 742, 751 (1946) (Congress "established the policy of not permitting interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction . . . by denying any form of review of an order of remand. . . . "); *Kloeb v. Armour & Co.*, 311 U.S. 199, 204 (1940) (predecessors of §1447(d) "were designed to limit possible review of orders remanding causes and thus prevent delay. . . . They entrust determination concerning such

matter to the informed judicial discretion of the district court and cut off review."); *Hernandez v. Brakegate, Ltd.*, 942 F.2d 1223, 1226 (7th Cir. 1991) ("Few remands would be recalled if appellate review were to be authorized, so the costs of delay are not worth bearing. That, at any event, is the judgment of Congress.").

It suffices to say here that the Fifth Circuit has, without citing legislative materials or distinguishing *Volvo*, *Gravitt* and *Briscoe*, greatly increased review of remand orders. If the Court is not inclined simply to reverse on the authority of these three cases, Petitioners respectfully request a full examination of the issue, and an articulation of clear categories of reviewability.

II. There Is an Important, Irreconcilable Conflict Between the Circuits, and Division Among the District Courts, as to the Meaning of "Removal Procedure."

Newly amended §1447(c) provides in pertinent part:

> A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under §1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

There is no doubt that mistakes in the mechanics of bringing a case to federal court, such as untimely removal, must be raised within 30 days; there is also no doubt that lack of subject matter jurisdiction will cause remand at any time prior to judgment.

The statute does not speak, however, to a third, very common type of case: remands for lack of *removal* jurisdiction. There are many cases which can be brought originally in federal court, but not removed to federal court – usually because of some statutory restriction on removability.

The present cases are typical examples. While there is diversity of citizenship, there are also local defendants. Under 28 U.S.C. §1441(b), cases are not removable on the basis of diversity if any defendant is a citizen of the state in which suit is brought. This is a confinement built into the very statute conferring removal jurisdiction.

The remand statute, §1447(c), does not explicitly address such restrictions on removal jurisdiction. The court below, however, held that they are "defects in removal procedure," thus putting it squarely in conflict with other courts giving that phrase its common-sense meaning.

A. There Is a Clear Conflict.

The court of appeals held that a "defect in removal procedure" includes not only formal problems in removing a case, but also statutory restrictions on removal jurisdiction itself. Under this view the local-citizen limitation is a "procedure."

The Third Circuit, on the other hand, has held that "removal procedure" means that and only that: the means of removing a case to federal court. In *Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207 (3d Cir.), *cert. denied*, 60 U.S.L.W. 3154 (1991), the parties to a reinsurance contract included

a forum selection clause in which the reinsurer, Chesapeake, agreed to submit to the jurisdiction of any court in the United States. Upon the insolvency of the underlying insurer, the Pennsylvania Insurance Commissioner sued Chesapeake in state court for its refusal to pay its share of losses. Chesapeake removed on the basis of diversity "in a manner which was timely and without procedural defect." *Id.* at 1210. The commissioner moved for remand on the basis of the forum selection clause 54 days after removal, and remand was granted.

On appeal,[4] the Third Circuit considered whether the forum selection clause could be raised as a ground for remand more than 30 days after removal, and straightforwardly held that it could:

> Accordingly, as the statute is clear on its face and the legislative history ambiguous at best, the district court was correct in holding that section 1447(c)'s requirement that "a motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal" applies only to motions for remand on the basis of any defect in removal procedure.

Id. at 1213. In other words, the only things that must be raised within 30 days are procedural mistakes;

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[4] The court held the order reviewable under a doctrine affording appeal where the district court decides a substantive matter of contract law. This situation typically arises in forum selection clause cases. E.g., *In re Delta American Re Ins. Co.*, 900 F.2d 890, 892 (6th Cir. 1990); *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 277 (9th Cir. 1984).

all other grounds – whether or not related to subject matter jurisdiction – may be raised after thirty days.

In the Third Circuit, then, a wide variety of grounds for remand other than procedural ones may be raised after 30 days, and if remand can be had after 30 days on the basis of a forum selection clause, surely it is possible on the basis of a restriction which is part of the very statute conferring removal jurisdiction. In the Fifth Circuit, on the other hand, only subject matter jurisdiction may be raised after thirty days.

The Fourth Circuit appears to share the Third Circuit's view. *See State v. Ivory*, 906 F.2d 999, 1000 (4th Cir. 1990) ("The thirty-day limitation applies only to objections to defects in removal procedure.").

B. The District Courts Are in Conflict in Their Treatment of §1447(c).

Trial courts have also given differing treatment to statutory restrictions on removal such as the local-defendant limitation in §1441(b). The court of appeals itself acknowledged that certain district courts have treated removal jurisdiction bars as procedural defects, while others have held that they are not defects in procedure at all but rather are jurisdictional problems which can be raised at a later time. *In re Shell Oil Co.*, 932 F.2d 1518, 1522 n. 11 (5th Cir. 1991) (*Shell I*). Compare *Taylor v. St. Louis S.W. Ry.*, 128 F.R.D. 118 (D. Kan. 1989) (§1441(b) is a procedure) and *Cook v. Shell Chemical Co.*, 730 F.Supp. 1381 (M.D. La. 1990) (bar to removal of worker's compensation case in 28 U.S.C. §1445(c) is a procedure) with *Blackmore v. Rock-Tenn Co.*, 756 F.Supp. 288 (N.D. Tex.

1991) (court may *sua sponte* remand worker's compensation case after 30 days) and *Patient Care, Inc. v. Freeman*, 755 F.Supp. 644 (D.N.J. 1991) (case removed in violation of 28 U.S.C. §1441(c)'s "separate and independent claim" provision remanded over a year after removal though subject matter jurisdiction not implicated).

There is more conflict even than the Fifth Circuit acknowledged. Another important restriction on removal of diversity cases is that no such case may be removed more than one year after commencement. 28 U.S.C. §1446(b). Two courts, without analysis of the question, have held this statute to be a procedural defect to be raised within 30 days. *See Leidolph ex rel. Warshafsky v. Eli Lilly & Co.*, 728 F.Supp. 1383 (E.D. Wis. 1990) and *Gray v. Moore Business Forms, Inc.*, 711 F.Supp. 543 (N.D. Cal. 1989).

Other courts have disagreed. In *Smith v. MBL Life Assurance Corp.*, 727 F.Supp. 601 (N.D. Ala. 1989), the court ruled that the one-year bar is not a procedure; instead, it is a congressional curtailment of federal jurisdiction. Noting the "general rule which strictly construes removal statutes against removal," and its particular force in diversity cases, the court stated:

> This court is unconvinced that plaintiff's motion is presented only "on the basis of a defect in removal *procedure*." Instead, this court recognizes the right of Congress, a right it has employed, to limit the jurisdiction of federal courts by distinguishing those diversity cases which have been pending longer than a year from those cases which have not.

Id. at 603.

The same result was reached in *Foiles v. Merrell National Laboratories,* 730 F.Supp. 108 (N.D. Ill. 1989), in which defendant removed on the basis of diversity over one year after suit was filed. Plaintiff's remand motion was filed over two months later. Clearly rejecting the idea that only subject matter jurisdiction can be considered more than thirty days after removal, the court found the one-year rule to be a "substantive limit on diversity jurisdiction" which would necessitate remand.

Finally, at least one court has remanded a diversity case *sua sponte,* well over 30 days after removal, because of the presence of a local defendant. Though the result was reached without analysis of new §1447(c), the amendment was in effect and the court can be presumed to have applied existing law. The local-defendant restriction was held subject to the established rule that objections to removeability, as distinct from subject matter jurisdiction, could be raised prior to judgment. *National Western Life Ins. Co. v. Fischer,* 722 F.Supp. 554, 555 n.1 (E.D. Wis. 1989).

C. RESOLUTION OF THE CONFLICT IS IMPORTANT

This Court should resolve the plain split between the Fifth and Third Circuits and the disarray among the district courts. Restrictions on removing local-defendant diversity cases, worker's compensation cases, diversity cases over one year old, and other types of cases such as Federal Employers Liability Act or Jones Act claims[5]

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[5] 28 U.S.C. §1445(a) bars removal of FELA actions, and applies also to Jones Act claims because the Act incorporates

(Continued on following page)

cannot be "procedures" in some courts, and for some litigants, but preclusive jurisdictional bars for others.

Aside from the inherent undesirability, and unfairness, of inconsistent application of federal statutes, the new rule announced below greatly expands federal jurisdiction over cases that Congress has determined do not belong in federal court. It goes without saying that removal statutes have long been construed strictly, against the right of removal. E.g., *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941). What is to be gained, then, from the rule announced below, which will require federal courts to hear so many cases not meant to be removed – when it certainly does not come naturally from §1447(c) but from such a strange interpretation of the word "procedure"?

The present cases are examples of cases that do not belong in federal court, but have ended up there only because of an interpretation of the word "procedure" that is unexpected and plainly against the normal meaning of the word. No discovery occurred in either case; indeed no action was taken by either side in either case other than briefing the remand point. Both district judges concluded that the cases did not belong in federal court because of the presence of proper local defendants. Yet now the cases are in federal court, not because they are meant to be, and not because of any conduct of discovery or litigation amounting to acquiescence to federal jurisdiction, but only because of a blindsiding, counterintuitive definition of "procedure."

(Continued from previous page)

provisions governing the FELA. *Lirette v. N.L. Sperry Sun, Inc.*, 810 F.2d 533, 535 (5th Cir.), *remanded to panel on other grounds*, 820 F.2d 116 (5th Cir. 1987) (en banc).

Section 1447 follows §1446, which is entitled "Procedure for removal." The reference to "removal procedure" in §1447(c) undoubtedly refers to the "procedure for removal" described in the previous section. It is enough at this point to say that there is no reason to transform "defect in removal procedure" to "defect in removal jurisdiction," as the Fifth Circuit has done. Any concerns that a removal jurisdiction bar might be tactically held in reserve, by a party waiting to see whether a case turns out favorably, are accommodated by the long-standing discretionary power to deny remand where trial on the merits, or even mere discovery, has occurred. *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699 (1972); *Johnson v. ODECO Oil & Gas Co.*, 864 F.2d 40 (5th Cir. 1989).

Petitioners submit there is little to recommend a rule which so suddenly and needlessly expands federal jurisdiction over numerous cases through such a tortured definition. Leaving aside the wisdom of the rule for now, however, there is a plain and irreducible divergence between the Fifth and Third Circuits, and there is substantial inconsistency among the district courts, in the application of §1447(c). This Court should resolve the conflict.

CONCLUSION

For the above reasons, this Court should issue a writ of certiorari to review the decisions of the Fifth Circuit. Petitioners respectfully reiterate that the settled rule against reviewability of remand orders dictates summary

reversal. Alternatively, the Court should grant the petition to examine the reviewability question and resolve the conflict concerning the meaning of "removal procedure."

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 91-2040
Summary Calendar

IN RE SHELL OIL COMPANY, CASTLE & COOKE, INC., DOLE FRESH FRUIT COMPANY, STANDARD FRUIT COMPANY, STANDARD FRUIT AND STEAMSHIP COMPANY, AND OCCIDENTAL CHEMICAL CORPORATION,

Petitioners.

On Petition for Writ of Mandamus
to the United States District Court
For the Southern District of Texas

(May 28, 1991)

Before POLITZ, DAVIS and BARKSDALE, Circuit Judges.

DAVIS, Circuit Judge:

A large number of Costa Rican nationals sued several defendants in Texas state court. The plaintiffs alleged that a chemical manufactured and used by the defendants in Costa Rican banana plantations rendered them sterile. On October 24, 1990, the defendants removed the case to the United States District Court in Houston. On November 27, 1990, the plaintiffs moved to remand the case to the state court. The plaintiffs argued that the case was improperly removed because two of the defendants were citizens of Texas, the original forum state. The local citizen defendants argued that they were fraudulently joined to defeat removal. The defendants further contended that

because the plaintiffs did not move to remand within 30 days of removal, they had waived their right to remand. In December 1990, the district court granted the plaintiffs' motion and remanded the case to state court. The defendants have applied to this court for a writ of mandamus compelling the district court to recall its remand order.

I.

The first issue we face is whether this court may review the district court's remand order. Severe limits have been placed on our authority to review a remand order. See 28 U.S.C. § 1447(d) ("An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise. . . . "). But in **Thermtron Products, Inc. v. Hermansdorfer,** 423 U.S. 336 (1976), the Supreme Court concluded that § 1447(d) did not preclude all review of remand orders. At that time, § 1447(c) provided that a district court shall remand a case if "the case was removed improvidently and without jurisdiction." The Court first observed that § 1447(d) prohibited review of all remand orders issued pursuant to § 1447(c). The **Thermtron** Court then framed the issue presented as "whether § 1447(d) also bars review where a case has been properly removed and the remand order is issued on grounds not authorized by 1447(c)." **Id.** at 343. The judge in **Thermtron** had issued a remand order based not on improvident removal and lack of jurisdiction, but "[b]ecause of [his] crowded docket and because other cases had priority on available trial time." **Id.** at 340. The

Supreme Court held that that remand order was reviewable because it was made for grounds not specified in § 1447(c).

Applying Thermtron to the instant case is difficult because § 1447(c) has been amended since that case was decided.[1] That section now provides:

> A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

28 U.S.C. § 1447(c). Thus the old language referring to a case being "removed improvidently and without jurisdiction" has been replaced with the new language of "lacks subject matter jurisdiction." Moreover, the new version of the statute imposes a 30-day time limit on filing remand motions for defects in "removal procedure."

In the instant case the district court never specifically cited § 1447(c). Instead it based its remand order on § 1441(b). That section provides that a diversity action "shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b). The forum defendants argue that they were fraudulently joined to circumvent removal. The district

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[1] Section 1447(d) has not been amended, and its text remains the same.

court rejected the defendants' argument and specifically found that they "failed to prove fraudulent joinder."[2] Although the defendants were citizens of the forum state, the district court still had subject matter jurisdiction because complete diversity existed. **See Strawbridge v. Curtiss,** 7 U.S. (3 Cranch) 267 (1806). Thus the district court, which clearly had subject matter jurisdiction, based its remand order on a lack of removal jurisdiction under § 1441(b). The question becomes whether a remand under these circumstances is reviewable.

While both sides take comfort in **Thermtron,** that case interpreted a pre-amendment § 1447(c). The defendants read **Thermtron** literally. They contend that Thermtron only bars review of remand orders issued on the authority of § 1447(c). **See** 423 U.S. at 345. Because amended § 1447(c) only refers to remand for "lack of subject matter jurisdiction," the defendants argue that only remands based on jurisdiction are immunized from review. Thus the defendants conclude that because the district court remanded the case for a non-jurisdictional reason, its order may be reviewed.

The plaintiffs read **Thermtron** differently. They argue that the remand in **Thermtron** was facially unauthorized because removal in that case had been entirely proper and not in violation of any statute. They cite language in **Thermtron** which says that "no express statutory provision forbid[s] the removal of this action." 423 U.S. at 344 n.8; **see also id.** at 343-44 (respondent did not question the propriety of the removal); **id.** at 345 (the Court of

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[2] We assume without deciding that this finding is correct.

Appeals did not suggest that the case was not removable under § 1441); **id.** at 351 (noting the case was "properly removed"). The plaintiffs argue that a patently unauthorized remand (such as in **Thermtron**) is different from a remand based on a statutory restriction on removal (such as § 1441(b)).[3]

We do not read **Thermtron** to say that the reviewability of a remand order depends on whether it is issued on the authority of a statute. While subsection (d) of § 1447 prohibits appellate review of remand orders, the Court held that that subsection must be read in conjunction with subsection (c). Thus according to **Thermtron,** only remand orders based on improvident removal and lack of jurisdiction (the text of then-existing § 1447(c)) escaped review. **See** 14A C. Wright, A. Miller & E. Cooper, **Federal Practice and Procedure** § 3740, at 595 (2d ed. 1985) [hereinafter Wright & Miller] ("the ban on review prescribed in Section 1447(d) was limited to remand orders based on grounds for removal authorized by Section 1447(c)"); **see also** 1A J. Moore & B. Ringle, **Moore's Federal Practice** ¶ 0.169[2.-1], at 694 (2d ed. 1990) [hereinafter **Moore's Federal Practice**] (mandamus is appropriate for cases "remanded on grounds not authorized by § 1447(c)").

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[3] **See, e.g., Midland Mortgage Co. v. Winner,** 532 F.2d 1342, 1344 (10th Cir. 1976) (per curiam) (an old § 1447(c) case which refused to review a remand based on § 1441(b)); **see also Patient Care, Inc. v. Freeman,** 755 F. Supp. 644, 652 (D.N.J. 1991) (noting in dictum that remand based on 1441(c) is unreviewable); **Dawson v. Orkin Exterminating Co.,** 736 F. Supp. 1049, 1054 (D. Colo. 1990) (remand based on § 1446(b) "would be unreviewable").

When Congress amended § 1447(c), it deleted the reference to "improvident removal" while simultaneously adding a requirement that motions to remand based on "any defect in removal procedure"[4] be made within 30 days. These changes reflect a congressional intent to delete improvident removal as an unreviewable basis for remand, at least when a motion to remand based on such improvident removal is made outside the 30-day time limit.[5] This leaves remand orders for lack of subject matter jurisdiction as the only clearly unreviewable remand orders. In the instant case, the district court based its remand order on § 1441(b) and not on lack of subject matter jurisdiction. While this basis may have been unreviewable under old § 1447(c) as an "improvident removal," it is not unreviewable under the amended § 1447(c). Thus, we are able to review the district court's remand order.

The Third Circuit adopted a similar view in **Air-Shields, Inc. v. Fullam,** 891 F.2d 63 (3d Cir. 1989). In **Air-Shields,** the district court found that the defendant had

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[4] As explained **infra** in part II, a removal in violation of § 1441(b) is a "defect in removal procedure" within the meaning of § 1447(c).

[5] Under new § 1447(c), remand orders based on lack of subject matter jurisdiction are clearly unreviewable. Arguably, remands based on timely motions to remand for a "defect in removal procedure" may also be unreviewable under the new statute. However, because the remand motion in this case was untimely, we need not decide whether remands based on timely motions would be unreviewable.

untimely removed a case under 28 U.S.C. § 1446(b).[6] **Id.** at 64-65. The district court then sua sponte remanded the case to state court even though more than 30 days had elapsed since the time of removal. **Id.** at 64. The Third Circuit reviewed the remand on a writ of mandamus, noting that:

> Because the district court's remand decision . . . was not based on the "controlling statute," [**i.e.**, newly amended § 1447(c)] our review is not limited by subsection (d) of Section 1447. . . . By remanding the case for procedural defects after the thirty day limit imposed by the revised Section 1447(c) had expired, the district court "exceeded [its] statutorily defined power." Therefore, the "issuance of the writ of mandamus [is] not barred by § 1447(d)."

Id. at 66 (quoting **Thermtron,** 423 U.S. at 351).

In summary, we agree with the Third Circuit that § 1447(d) does not bar review of remands not based on § 1447(c). Because the instant remand was not based on § 1447(c), we may review the district court's remand order under the present writ of mandamus.

II.

Now that we have determined that we have jurisdiction to review the district court's remand order, the next

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[6] Section 1446(b) sets a 30-day time limit for removal from the defendant's receipt of the initial pleading or service of summons upon the defendant, whichever period is shorter. See 28 U.S.C. § 1446(b).

issue presented is the correctness of that order. The district court remanded plaintiffs' case because two of the defendants were citizens of the forum state. Thus the district court held that the case should not have been removed under 28 U.S.C. § 1441(b). This brings us to the defendants' argument that the requirements of § 1441(b) are waivable and that plaintiffs waived them by not filing a timely motion to remand. The defendants base their argument on the new text of § 1447(c) that "[a] motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal." The plaintiffs concede that their motion to remand was made more than 30 days after the notice of removal was filed. Thus the question becomes whether the presence of forum defendants in violation of § 1441(b) is a "defect in removal procedure" that § 1447(c)'s time limit for motions to remand is applicable.

What does the language "any defect in removal procedure" mean? Professor Siegel explains that Congress sought to distinguish remands for "procedural defects" from remands that may arise after removal, particularly remands relating to the court's ancillary jurisdiction.[7] Siegel, **Commentary on 1988 Revision,** 28 U.S.C.A. § 1447(c), at 53-54 (West Cum. Supp. 1991) [hereinafter Siegel, **1988 Commentary**]; **see also** Siegel, **Changes in**

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[7] While we follow Professor Siegel's terminology by referring to "ancillary jurisdiction," we note that under recently enacted legislation the term "supplemental jurisdiction" is to be used for all civil cases commenced on or after December 1, 1990. 28 U.S.C.A. § 1367. (West Cum. Supp. 1991).

Federal Jurisdiction and Practice Under the New Judicial Improvements and Access to Justice Act, 123 F.R.D. 399, 405 (1989).[8] Siegel asserts that § 1447(c) is written in such a way that a remand may be made after the 30-day limit if something arises later that would make remand proper. Siegel, **1988 Commentary, supra, at 53-54; see also H.R. Rep. No.** 889, 100th Cong., 2d Sess. 73 ("[t]he amendment is written in terms of a defect in 'removal procedure' in order to avoid any implication that remand is unavailable after disposition of all federal questions leaves only State law questions"), **reprinted in** 1988 **U.S. Code Cong. & Admin. News** 5982, 6033 [hereinafter **House Report**].[9]

For example, a case with state and federal claims is properly removed to federal court. The federal claims are dismissed after 30 days. The federal court still has ancillary jurisdiction to hear just the state claims. However, the

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[8] According to Siegel:

> The ***only reason*** for the inclusion of the phrase "any defect in removal procedure" – since the amendment could have been simply phrased to impose the 30-day limit on all remand motions except one based on subject matter jurisdiction – is to avoid a construction that might prevent the court from making later remands in other than "procedural defect" situations [**i.e.,** in cases involving ancillary jurisdiction].

Siegel, **1988 Commentary, supra,** at 53 (emphasis added).

[9] No comparable Senate Report was submitted with this legislation. 1988 **U.S. Code Cong. & Admin. News** at 5982. However, this House Report "was subsequently presented to the Senate." **Greer v. Skilcraft,** 704 F. Supp. 1570, 1576 (N.D. Ala. 1989) (citing 134 **Cong. Rec.** S16,308-09 (1988)).

district court may want to remand those claims to state court. As Professor Siegel explains:

> While the dropping out of the claim on which the other claims depended does not bring about a defect of subject matter jurisdiction – because the court has discretion to retain and try the remaining claims and a defect in subject matter jurisdiction can never allow that – neither is it to be deemed a mere defect of "procedure" that would trigger the 30-day rule.

Siegel, **1988 Commentary, supra,** at 54. Professor Siegel's model obviously does not fit today's case. In the present case, the removal defect of which plaintiff complains (**i.e.,** forum defendants) was present at the time of removal and did not arise later.

Other commentators agree with Professor Siegel that "any defect in removal procedure" would include a violation of § 1441(b). For example, Professor Moore states that "formal defects in removal procedure are waived unless raised in a motion to remand within 30 days after removal." **Moore's Federal Practice, supra,** ¶ 0.157[11.-4], at 172-73. He asserts that such "an irregularity in removal is waivable." **Id.** at 173. More to the point, he cites as an example the instant situation of "where there is diversity but the defendant is a citizen of the state in which the action is brought." **Id.** Professor Moore reiterates that "[t]he motion to remand must be made within 30 days after removal, if the objections are of a character that can be waived, such as formal and modal matters pertaining to the procedure for removal ***or the non-removability of a proceeding otherwise within federal jurisdiction***." **Id.** at ¶ 0.168[4.1], at 644 (footnotes omitted) (emphasis added).

Professor Moore further explains that the new text of § 1447(c) "makes a distinction between formal defects in removal procedure [and] lack of subject matter jurisdiction." **Id.** at 642. Professors Wright and Miller agree. They state that the amendment to § 1447(c) "requires remand ***on any ground other than lack of subject matter jurisdiction*** to be sought within 30 days of the filing of a notice of removal." Wright & Miller, **supra,** § 3739, at 95 (2d ed. Supp. 1990) (emphasis added); **see also House Report, supra,** at 72 (remand must be sought within 30 days "on any ground other than lack of subject matter jurisdiction"). Wright and Miller explain that the policy behind this rule is to "prevent a party who is aware of a defect in removal procedure from using the defect as insurance against later unfavorable developments in federal court." Wright & Miller, **supra,** § 3739 at 95 (2d ed. Supp. 1990); **see also House Report, supra,** at 72 (one aware of such a removal defect may hold the defect "in reserve as a means of forum shopping").

The Third Circuit opinion in **Air-Shields, Inc. v. Fullam,** 891 F.2d 63 (3d Cir. 1989) (discussed above), is the only appellate court interpretation of the relevant amendments of § 1447(c) that we have discovered.[10] In **Air-Shields,** the Third Circuit held that after the 30-day time limit of § 1447(c) had expired, the district court was powerless to remand a case improperly removed under

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[10] In the only Fifth Circuit cases interpreting amended § 1447(c), the district courts' remands were based on "lack of subject matter jurisdiction" and therefore clearly unreviewable under § 1447(d). **See Tillman v. CSX Transp., Inc.,** 929 F.2d 1023 (5th Cir. 1991); **Soley v. First Nat'l Bank of Commerce,** 923 F.2d 406 (5th Cir. 1991).

§ 1446(b). **Id.** at 66. Admittedly the § 1446(b) defect – failure to remove timely – at issue in **Air-Shields** is more clearly a procedural rather than a substantive remand defect. But we are persuaded by the language of the House report and the commentators that "any defect in removal procedure" includes all non-jurisdictional defects existing at the time of removal.[11]

Applying amended § 1447(c) to the instant case, we conclude that plaintiffs have waived any non-jurisdictional grounds for remand existing at the time of removal by not moving to remand within 30 days of the notice of removal. Improper removal under § 1441(b) is such a waivable removal defect. Plaintiffs concede that their remand motion was not made within this 30-day time

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[11] The district courts have differed in their application of § 1447(c). **See Taylor v. St. Louis S.W. Ry.,** 128 F.R.D. 118, 120 (D. Kan. 1989) (although case improperly removed to federal court in violation of § 1441(b), plaintiffs' motion to remand denied because made after the 30-day time limit of § 1447(c)); **see also Cook v. Shell Chem. Co.,** 730 F. Supp. 1381, 1382 (M.D. La. 1990) (although worker's compensation case improperly removed to federal court in violation of § 1445(c) and improperly removed to the wrong federal district in violation of § 1441(a), plaintiff waived these defects in removal procedure by not filing her motion to remand within the 30-day time limit of § 1447(c)). **But see Blackmore v. Rock-Tenn Co., Mill Div.,** 756 F. Supp. 288, 289-90 (N.D. Tex. 1991) (district court may sua sponte remand case removed in violation of § 1445(c) even after the 30-day time limit of § 1447(c)) (citing **Federal Deposit Ins. Corp. v. Loyd,** 744 F. Supp. 126, 131-32 (N.D. Tex. 1990)); **Patient Care, Inc. v. Freeman,** 755 F. Supp 644 (D.N.J. 1991) (remand order based on § 1441(c) – separate and independent removable claim joined with non-removable claim – issued more than 30-days after notice of removal filed).

limit.[12] We therefore grant the defendants' petition for writ of mandamus to the district court and vacate its remand order.

Accordingly, the defendants' petition for writ of mandamus is GRANTED, and the remand order of the district court is VACATED.

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[12] This case, unlike its companion case (**In re Shell Oil Co.**, No. 91-2044), does not involve any assertion by plaintiff of a "gentlemen's agreement" with defense counsel allegedly extending the time limit allowed for moving to remand.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-2044
(D.C. Docket #CA-H-88-3453)

IN RE: SHELL OIL COMPANY, CASTLE & COOKE, INC., DOLE FRESH FRUIT COMPANY STANDARD FRUIT COMPANY, STANDARD FRUIT & STEAMSHIP COMPANY, and DOW CHEMICAL COMPANY,

Petitioners.

On Petition for Writ of Mandamus to the
United States District Court
for the Southern District of Texas

(May 28, 1991)

Before POLITZ, DAVIS, and BARKSDALE, Circuit Judges.

BARKSDALE, Circuit Judge:

The petitioners, defendants in state court lawsuits consolidated after removal to the district court, seek a writ of mandamus concerning the district court granting the plaintiffs' remand motion. We **GRANT** the petition and **VACATE** the remand order.

I.

In a companion case, *In Re Shell Oil Co., et al.*, No. 91-2040, discussed *infra*, we reviewed a similar remand

order under the 1988 amendments to one of the removal statutes, 28 U.S.C. § 1447, and held that the plaintiffs had waived their objection to the removal by failing to file a motion for remand within 30 days of removal. There, as here, the 28 U.S.C. § 1441(b) bar to removal concerning a forum defendant is involved.

Between August 1988 and June 1989, the plaintiffs, 171 Costa Rican nationals, filed six separate lawsuits in Texas state court against Shell and others, alleging that a chemical manufactured and used by the defendants in Costa Rican banana plantations rendered them sterile. For diversity jurisdiction purposes, Shell is a citizen of Delaware (state of incorporation), and Texas (principal place of business). 28 U.S.C. § 1332(c)(1).

On various dates between September 30, 1988, and August 3, 1989, the defendants timely removed the six cases to federal court on the basis of diversity jurisdiction, including alleging fraudulent joinder of Shell. Such joinder was charged in order to avoid § 1441(b)'s prohibition against removal if a defendant is a citizen of the forum state.[1] On January 9, 1990, the district court

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[1] 28 U.S.C. § 1441(b) states:

> Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. *Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the state in which such action is brought.*

(Emphasis added.)

consolidated the cases. On May 3, 1990, the plaintiffs filed a motion to remand, arguing that the cases were removed in violation of § 1441(b), on the ground that Shell was not fraudulently joined. On May 27, 1990, the defendants filed a response to the motion. The district court granted the motion to remand on June 26, 1990, holding that the defendants had not proved that Shell was fraudulently joined, and that the case was, therefore, improperly removed.

On July 6, 1990, the defendants filed a motion for reconsideration and to vacate the remand order; and supplements to the motion were filed on July 11, 17, and 31, September 28, and November 30, 1990. In the November 30 supplement, the defendants argued, for the first time, that the remand motion was untimely, pursuant to 28 U.S.C. § 1447(c), because it was filed more than 30 days after removal. The district court denied the motion for reconsideration on December 14, 1990. On January 18, 1991, the defendants filed the petition for writ of mandamus, seeking reversal of the remand order and the order denying their motion for reconsideration. By order entered January 24, 1991, we stayed the remand order, pending ruling on the petition.

II.

A.

We must first determine whether we have jurisdiction to review the remand order. Our authority to review that order is limited by 28 U.S.C. § 1447(d), which provides in pertinent part that "[a]n order remanding a case to the State court from which it was removed is not

reviewable on appeal or otherwise."[2] However, in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), the Supreme Court held that § 1447(d)'s bar on reviewability is not applicable where the district court remands a case on grounds other than those authorized by § 1447(c). At the time *Thermtron* was decided, § 1447(c) provided for remand if "the case was removed improvidently and without jurisdiction." Section 1447(c) was amended after *Thermtron* was decided, and now provides:

> A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

The district court remanded the cases because it concluded that Shell was not fraudulently joined and, therefore, removal was improper under § 1441(b). Although Shell is a citizen of the forum state, Texas, the district court had subject matter jurisdiction, because complete diversity existed between the parties. *See Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).

In the companion case, *In Re Shell Oil Co., et al.*, No. 91-2040, we held that, although a remand order based upon § 1441(b) may have been unreviewable under former § 1447(c) if it concerned an "improvident removal," such an order, if based on an untimely motion to remand,

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[2] In an exception not applicable here, § 1447(d) permits review of orders remanding cases removed pursuant to 28 U.S.C. § 1443.

is reviewable under amended § 1447(c), which deleted the reference to "improvident removal," and now provides for remand "for lack of subject matter jurisdiction."[3] In the companion case, we held that § 1447(d) did not bar review of the remand order in that case, which was based on § 1441(b) and an untimely motion to remand.[4]

Our holding in that case does not fully resolve the reviewability issue here, however, because, prior to the amendment of § 1447(c), four of the six consolidated cases were filed and three were removed to federal court. Our authority to review the remand orders with respect to the cases pending prior to the amendment therefore depends upon whether § 1447(c), as amended, is applicable to such cases.

The Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, Title X, § 1016(b), 102 Stat. 4670 (Nov. 19, 1988), does not provide an effective date for the amendment to § 1447(c). We join the other courts that

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[3] As discussed *infra*, § 1447(c)'s amendment includes a 30-day period for seeking remand.

[4] Here, as in the companion case, we limit our holding to cases in which the remand motions were not timely, and in which the remand orders were not based on lack of subject matter jurisdiction. In the companion case (note 5), we stated:

> Under new § 1447(c), remand orders based on lack of subject matter jurisdiction are clearly unreviewable. Arguably, remands based on timely motions to remand for a "defect in removal procedure" may also be unreviewable under the new statute. However, because the remand motion in this case was untimely, we need not decide whether remands based on timely motions would be unreviewable.

have considered the effective date and hold that it took effect on November 19, 1988, the day the President signed the bill. *See Leidolf by Warshafsky v. Eli Lilly & Co.*, 728 F.Supp. 1383, 1387 (E.D. Wis. 1990) and cases cited therein; *see also Siegel, Commentary on Revision*, 28 U.S.C.A. § 1447, at 55 (West Cum. Supp. 1991). Amendments to procedural legislation are applicable to pending litigation "absent some contrary indications by Congress and absent any procedural prejudice to either party." *Denver & Rio Grande Western Railroad Co. v. Brotherhood of Railroad Trainmen*, 387 U.S. 556, 563 (1967).

In applying this two-part test, we note that the legislative history for the amendment to § 1447(c) reveals no indication that "improvident removal" should continue to serve as a basis for remand in cases pending at the time of the amendment. To the contrary, the Section-by-Section Analysis contained in H.R.Rep. No. 889, 100th Cong., 2d Sess. 72 (1988), *reprinted in* U.S. Code Cong. & Admin. News 1988, at 5982, 6033, supports application of the amendment to pending cases:

> [Former] [s]ection 1447(c) . . . appears to require remand to state court if at any time before final judgment it appears that the removal was improvident. So long as the defect in removal procedure does not involve a lack of federal subject matter jurisdiction, there is no reason why either State or Federal courts, or the parties, should be subject to the burdens of shuffling a case between two courts that each have subject matter jurisdiction. There is also some risk that a party who is aware of a defect in removal procedure may hold the defect in reserve as a means for forum shopping if the

> litigation should take an unfavorable turn. The amendment provides a period of 30 days within which remand must be sought on any ground other than lack of subject matter jurisdiction.

And, concerning the second prong of the test, we note that the plaintiffs did not move for remand until May 3, 1990, long after the effective date of the amendment. Neither party has argued that application of § 1447(c), as amended, will result in prejudice;[5] and we can perceive none. We therefore conclude that it is appropriate to apply § 1447(c), as amended, in determining our authority to review the remand order. *But cf. Fowler v. Safeco Ins. Co. of America*, 915 F.2d 616, 617 n.2 (11th Cir. 1990) (applying former version of § 1447 to action initiated prior to 1988 amendments).

B.

We next consider the correctness of the district court's remand order. As in the companion case, the order was based on improper removal under § 1441(b). In that case, we held that the presence of forum defendants in violation of § 1441(b) is a "defect in removal procedure" within the meaning of the first sentence of § 1447(c), thus making the 30-day time limit for remand motions applicable.[6] Because the plaintiffs in that case

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[5] In fact, the plaintiffs cite authority to support application of the amended version of § 1447(c) to pending cases.

[6] As amended, § 1447(c) requires that motions for remand must be made within 30 days of removal, except in cases in

(Continued on following page)

did not move for remand within the 30-day period, we held that they had waived their objection to the improper removal.

The defendants argue here, as they did in the companion case, that the plaintiffs waived their objections to removal by failing to comply with § 1447(c)'s 30-day limit. This case, however, involves several factors that were not present in that case: (1) three of the consolidated cases were removed before, and three after, the effective date of the 1988 amendments; (2) the defendants did not bring the 30-day limit to the attention of the district court until they filed their third supplement to their motion for reconsideration; and (3) the plaintiffs allege that all parties had agreed that a motion for remand would not have to be filed until the Texas Supreme Court rendered a final decision in another case involving the applicability of the doctrine of *forum non conveniens* in Texas state courts.

1.

We first consider whether the 30-day rule is applicable to all six cases. The former version of § 1447(c), in effect at the time the first three cases were removed, contained no time limit for filing remand motions.[7]

(Continued from previous page)

which the court lacks subject matter jurisdiction. The first sentence states: "A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a)."

[7] However, it was well established that a plaintiff could waive objections to removal on any grounds other than a lack

(Continued on following page)

As discussed in part A. above, neither the statute nor the legislative history contain any indication that the 30-day rule should not apply to pending cases; and the plaintiffs have not shown any procedural prejudice that would result from application of the 30-day rule to the three cases removed prior to November 19, 1988. The plaintiffs argue, however, that the 30-day rule does not bar a remand motion filed more than 30 days after removal, if that motion is based on § 1441(b). Their argument is foreclosed by our holding in the companion case.

In light of Congress' intent that parties aware of removal defects, such as the one present in this case, not hold them in reserve as a means of forum shopping,[8] we conclude that it is appropriate to apply the 30-day rule to all six of the consolidated cases. Therefore, the motion to remand was untimely.

(Continued from previous page)

of subject matter jurisdiction by failing to assert such objections prior to engaging in affirmative conduct in federal court. *See, e.g., Johnson v. Odeco Oil & Gas Co.*, 864 F.2d 40, 42 (5th Cir. 1989).

[8] As discussed *infra*, it appears that the plaintiffs' delay in seeking remand was motivated by forum shopping concerns. According to the plaintiffs, the parties agreed that remand would not be sought until the Texas Supreme Court decided whether Texas would recognize the doctrine of *forum non conveniens*, in the case of *Dow Chemical Co. v. Alfaro*, 786 S.W.2d 674 (Tex. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 671 (1991). According to the plaintiffs, the parties wished to "avoid the considerable effort and expense involved in briefing" the issue of whether Shell was fraudulently joined. Apparently that effort would not have been undertaken had the Texas court recognized the doctrine of *forum non conveniens*.

2.

The plaintiffs contend that, once the remand order was entered and mailed to the state courts, the district court was without authority to reconsider its remand order, and that the petition for writ of mandamus, filed seven months after the remand order, was therefore untimely. They further contend that the defendants waived their 30-day rule argument by failing to bring it to the attention of the district court until their third supplement to their motion for reconsideration, filed over five months after the remand order was entered.

(a)

Although this court has stated that "[t]he federal court is completely divested of jurisdiction once it mails a certified copy of the [remand] order to the clerk of the state court," *Browning v. Navarro*, 743 F.2d 1069, 1078 (5th Cir. 1984), that case involved a non-reviewable remand order. The other case cited by the plaintiffs, *New Orleans Public Service, Inc. v. Majoue*, 802 F.2d 166 (5th Cir. 1986), also involved a nonreviewable remand order based upon a lack of subject matter jurisdiction. It is clear that, where an exception to nonreviewability exists, "an appellate court has jurisdiction to review the remand order, and a district court has jurisdiction to review its own order, and vacate or reinstate that order." *In re Shell Oil Co.*, 631 F.2d 1156 (5th Cir. 1980); *see also In re Allied-Signal, Inc.*, 919 F.2d 277, 281 (5th Cir. 1990).

Because the remand order was based on a defect in removal procedure, and not a lack of subject matter jurisdiction, an exception to non-reviewability existed. The

district court, therefore, had authority to reconsider its remand order. It did not deny the defendants' motion for reconsideration until December 14, 1990; and the timeliness of the petition for writ of mandamus must be measured from that date, and not, as the plaintiffs contend, from the date of the remand order. The petition for writ of mandamus, filed on January 18, 1991, was not untimely.

(b)

The plaintiffs argue next that the defendants waived their objection to the timeliness of the remand motion by failing to raise that objection until their third supplement to the motion for reconsideration. *See Student A. v. Metcho*, 710 F.Supp. 267 (N.D. Cal. 1989) (although plaintiff's motion for remand was filed more than 30 days after removal, defendant waived objection to untimeliness by failing to raise objection). Under the circumstances of this case, we decline to hold that they did so. Although the defendants did not assert the 30-day rule until five months after the remand order, they nevertheless gave the district court an opportunity to consider their argument prior to its decision on the motion for reconsideration. Furthermore, there is no indication that either the district court's remand order, or its denial of the motion for reconsideration, were based on the defendants' failure to raise the 30-day rule in a more timely manner. In addition, Congress' clear intent to avoid the burdens of shuffling a case between two courts that each have subject matter jurisdiction, and to discourage holding defects in removal procedure in reserve as a means for forum shopping, would not be advanced by accepting the

waiver argument. We therefore conclude that the defendants did not waive their objection to the timeliness of the plaintiffs' motion for remand.

3.

Finally, the plaintiffs argue that the defendants are, in effect, estopped from objecting to the untimeliness of their remand motion, because, during the entire period before it was filed, all parties had agreed that it should not be filed until after the Texas Supreme Court decided whether Texas would recognize the doctrine of *forum non conveniens* in *Dow Chemical Co. v. Alfaro*, 786 S.W.2d 674 (Tex. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 671 (1991). *Alfaro* was decided on March 28, 1990, and rehearing denied on May 2, 1990; the motion for remand was filed on May 3, 1990.

The plaintiffs' argument is unpersuasive. Even if we assume that such an agreement existed, it does not excuse the plaintiffs' delay in filing the motion for remand. The Texas Supreme Court's resolution of the *forum non conveniens* issue in *Alfaro* could not possibly have any effect upon the district court's resolution of whether Shell was fraudulently joined. In fact, it is likely that the plaintiffs would not have moved for remand if the Texas Supreme Court had recognized the doctrine of *forum non conveniens*. As we have already noted, the plaintiffs' delay in seeking remand was apparently motivated by forum shopping concerns, something that Congress clearly intended to discourage through its amendments to § 1447(c). If, based upon such concerns, parties are allowed to circumvent the 30-day limit for filing remand

motions through agreements such as the one alleged by the plaintiffs, Congress' intent to discourage forum shopping and to avoid shuffling cases between two courts that each have subject matter jurisdiction cannot be achieved.[9]

III.

Accordingly, we hold that, because the plaintiffs' motion for remand was untimely, the district court had no discretion to remand on the basis of improper removal under § 1441(b) and, therefore, erred in remanding the cases.[10] Therefore, the petition for writ of mandamus is **GRANTED**, and the district court's remand order and order denying the defendants' motion for reconsideration are **VACATED**.

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[9] Congress' desire that remand be handled expeditiously is reflected in the plain language of § 1447(c): the motion to remand "*must* be made within thirty days after [removal]." (Emphasis added.) To meet this Congressional directive, there must, at a minimum, be an express agreement between the parties, approved by the district court, to waive the 30 day period for remand.

[10] Our resolution of this issue makes it unnecessary for us to address the defendants' argument that the district court erroneously applied the standard applicable to fraudulent joinder determinations.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

GERARDO ACUNA CASTILLO, *et al.*, Plaintiffs,	)	CIVIL ACTION
v.	)	NO. H-90-3288
DOW CHEMICAL COMPANY, *et al.*, Defendants.	)	

MEMORANDUM OPINION

(Filed Dec. 27, 1990)

This case is before the Court on plaintiffs' motion to remand. It is undisputed that two defendants, Occidental Chemical Corporation ("Occidental") and Shell Oil Company ("Shell"), are citizens of Texas, making removal improper under 28 U.S.C. § 1441(b). Shell and Occidental argue, however, that remand should be denied in this case because they were fraudulently joined as defendants in order to preclude removal by the other defendants. The parties have submitted briefs supported by affidavits and other evidence, and the Court has reviewed the record and the applicable case law. The Court finds that defendants have failed to prove fraudulent joinder, the plaintiffs' motion to remand is not untimely, and that the case should be remanded to state court.

Plaintiffs herein are all residents of Costa Rica and have alleged personal injuries resulting from exposure to

pesticides manufactured, distributed or used by the various defendants. Shell and Occidental assert that they have not sold the pesticide chemicals in Costa Rica. Plaintiffs have submitted affidavits which indicate that Shell products were used at the location in Costa Rica where plaintiffs worked and that Occidental had a contractual relationship with Dow Chemical Company under which it is reasonable to believe the pesticide chemicals were distributed in Costa Rica. Defendants have submitted counter-affidavits which indicate that no products of Shell or Occidental were used in Costa Rica.

Defendants who assert fraudulent joinder in opposition to a motion to remand must prove by clear and convincing evidence that the joinder was fraudulent. *Grassi v. Ciba-Geigy, Ltd.*, 894 F.2d 181, 186, *reh. denied*, F.2d 11 (5th Cir. 1990). There is no allegation by defendants that plaintiffs' allegations of jurisdictional facts was fraudulent. Instead, defendants argue that there is no possibility that plaintiffs could establish a cause of action against any in-state defendant because plaintiffs were not exposed to Shell or Occidental products. *See B., Inc. v. Miller Brewing Co.*, 663 F.2d 545, 549 (5th Cir. 1981). Plaintiffs have clearly pled causes of action for products liability and conspiracy against Shell and Occidental. When considering allegations of fraudulent joinder, the Court must "evaluate all of the factual allegations in the light most favorable to the plaintiff, resolving all contested issues of substantive fact in favor of the plaintiff." *B., Inc.*, 663 F.2d at 549. The affidavits, when considered in a light most favorable to plaintiffs, provide evidentiary support for plaintiffs' claims. If plaintiffs' allegations are ultimately proved to the satisfaction of the trier of fact,

plaintiffs could prevail. Whether plaintiffs can in fact prove their allegations is an issue to be determined by the state court, however, for defendants have failed to carry their burden of proving fraudulent joinder with clear and convincing evidence that there is *no possibility* of recovery by plaintiffs in their state court action.

Because defendants have failed to prove fraudulent joinder and because it is undisputed that Shell and Occidental are citizens of this state, the motion to remand should be **granted**. An appropriate order consistent with this memorandum opinion shall be signed this day.

SIGNED this 19th day of December, 1990.

/s/ James DeAnda
Chief Judge
United States
District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

GERARDO ACUNA CASTILLO, *et al.*,	)	
Plaintiffs,	)	CIVIL ACTION
v.	)	NO. H-90-3288
DOW CHEMICAL COMPANY, *et al.*,	)	
Defendants.	)	

REMAND ORDER

(Filed Dec. 27, 1990)

In accordance with the memorandum opinion signed this day, it is hereby

ORDERED

that plaintiffs' motion to remand is **GRANTED**, and the case **REMANDED** to the 270th Judicial District Court for Harris County, Texas.

SIGNED this 19th day of December, 1990.

/s/ James DeAnda
Chief Judge
United States
District Court

(SEAL)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MIGUEL CHAVEZ ARRIOLA, *et al.*, Plaintiffs,	)	CIVIL ACTION NO. H-88-3453
v.	)	
DOW CHEMICAL COMPANY, *et al.*, Defendants.	)	

ORDER

(Filed June 26, 1990)

Pending before the Court are Defendant Shell Oil Company's Motion to Dismiss for Fraudulent Joinder (instrument number 20) and Plaintiffs' Motion to Remand (instrument number 25). Both of these motions relate to the same basic issue of whether Defendant Shell Oil was fraudulently joined and, thus, whether the action was properly removed from state court. Having considered the motions and responses thereto, if any, the record on file, and the applicable law, the Court is of the opinion that the motion to remand should be granted and the motion to dismiss should therefore be denied. All other pending motions are hereby rendered moot.

BACKGROUND

Plaintiffs are all residents of Costa Rica and have alleged that they suffered sterility and other harms as a result of exposure to pesticides manufactured or used by Defendants. It is alleged that the defendants produced, sold and/or otherwise put into the stream of commerce, or required Plaintiffs to be exposed to nematocides containing dibromochloropropane (DBCP). Plaintiffs filed six separate actions in state court and defendants removed them to federal court on the basis of diversity jurisdiction as a result of the alleged fraudulent joinder of Shell Oil Company. The six removed cases were consolidated in this Court under the above style and caption.

DISCUSSION

In its motion to dismiss, Shell Oil contends that Plaintiffs have failed to state a cause of action against it upon which relief can be granted, because no plaintiff has ever been exposed to any Shell product. This is Shell's sole argument in support of its motion to dismiss: no cause of action has been pled for which relief can be granted due to fraudulent joinder.

In the motion to remand, Plaintiffs argue that because defendants have not contended fraudulent jurisdictional facts, then the Court's task is to determine whether the allegations in Plaintiffs' complaints state viable causes of action. Shell apparently argues against remand because the Texas Supreme Court has held that the doctrine of forum non conveniens does not exist in Texas. *See Dow Chemical Co. v. Alfaro*, 786 S.W.2d 674 (Tex. 1990). Shell urges that the cause remain in federal court

and Shell be dismissed on the grounds of forum non conveniens. *See Cabalceta v. Standard Fruit Co.*, 883 F.2d 1553 (11th Cir. 1989).

When a removing defendant pleads fraudulent joinder, the defendant has a heavy burden in proving fraudulent joinder by means of clear and convincing evidence. *See Grassi v. Ciba-Geigy, Ltd.*, 894 F.2d 181, 186 (5th Cir. 1990). In order to prove fraudulent joinder, the removing party must show either that there is no possibility that the plaintiff would be able to establish a cause of action against the in-state defendant in state court or that there has been outright fraud in the plaintiff's pleadings of jurisdictional facts. *B., Inc. v. Miller Brewing Co.*, 663 F.2d 545, 549 (5th Cir. 1981). This Court, therefore, must determine whether the Plaintiffs' allegations against Shell state a cause of action recognizable in state court.

The allegations against Shell are that it manufactured Nemagon, a pesticide containing the chemical DBCP, which was used to spray fruit in Costa Rica, resulting in injuries to Plaintiffs. It is further alleged that Shell conspired with the other Defendants to keep Plaintiffs uniformed of the dangerous propensities of its products. These allegations are precisely what is needed to make out a tort cause of action against Shell based on products liability and conspiracy theories. If Plaintiffs can prove that Shell's product was in fact used in Costa Rica at a place where Plaintiffs worked and at a time when Plaintiffs would have been present as well as Shell's involvement in misrepresenting and suppressing the truth of the dangers associated with the product, then they will have prevailed. It is Shell's contention that Plaintiffs cannot prove any such set of facts. It is well settled, however,

that "district courts must not 'pre-try' substantive factual issues in order to answer the discrete threshold question of whether the joinder of an in-state defendant is fraudulent." *B., Inc.*, 663 F.2d at 549 (citations omitted).

Shell has not carried its burden in providing this Court with clear and convincing evidence that it was fraudulently joined. Shell admits that its principal place of business is in Houston, but denies that its pesticide product was ever used by Plaintiffs. There is no proof that this cause of action against Shell could not be pursued in state court.

The motion to dismiss contains an affidavit from Max Kirby, supervisor of services for Shell Agricultural Chemical Business Center for Shell Agricultural Chemicals of Shell Chemical Company. Kirby testifies in the affidavit that he personally examined all sales records of Nemagon, the subject product, from 1959 to 1978 and determined that sales were made to Standard Fruit Company in 1967, 1968, 1969, and 1970. He further states that Shell suspended sales of Nemagon in 1978.

Shell's argument appears to be that the only manner in which Nemagon could have been used in Costa Rica and caused the alleged injuries to Plaintiffs would have been through sales to Standard Fruit Company. The Kirby affidavit, however does not go that far. There is no clear and convincing evidence before this Court to show that Plaintiffs knew that Shell could not have provided the product that allegedly caused these injuries.

It is the conclusion of this Court that Shell Oil was not fraudulently joined and therefore removal from state court was improper.

It is therefore **ORDERED** that the motion to dismiss is **DENIED**.

It is further **ORDERED** that the motion to remand is **GRANTED** and that the cases consolidated in this action are remanded to the individual state district courts as follows:

CA-H-88-3453 to 164th Judicial District Court of Harris County, Texas;

CA-H-88-3485 to 270th Judicial District Court of Harris County, Texas;

CA-H-88-3894 to 61st Judicial District Court of Harris County, Texas;

CA-H-88-4160 to 334th Judicial District Court of Harris County, Texas;

CA-H-89-2307 to 80th Judicial District Court of Harris County, Texas;

CA-H-89-2582 to 215th Judicial District Court of Harris County, Texas;

It is further **ORDERED** that all remaining pending motions are **MOOT**.

SIGNED this 21st day of June, 1990.

/s/ Kenneth M. Hoyt

KENNETH M. HOYT
United States
District Judge

(SEAL)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MIGUEL CHAVEZ ARRIOLA, ET AL.,	§	
Plaintiffs,	§	CIVIL ACTION NO. H-88-3453
VS.	§	
DOW CHEMICAL COMPANY, ET AL.,	§	
Defendants.	§	

ORDER

(Filed Dec. 14, 1990)

The defendants' motion for reconsideration and to vacate order of remand is DENIED.

SIGNED this 11th day of December, 1990.

/s/ Kenneth M. Hoyt
KENNETH M. HOYT
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-2040

IN RE:

SHELL OIL COMPANY, CASTLE & COOKE, INC., DOLE FRESH FRUIT COMPANY, STANDARD FRUIT COMPANY, STANDARD FRUIT & STEAMSHIP COMPANY, and OCCIDENTAL CHEMICAL CORPORATION,
Petitioners.

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(JULY 29, 1991)

Before POLITZ, DAVIS and BARKSDALE, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are

in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

W. Eugene Davis
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-2044

IN RE:

SHELL OIL COMPANY, CASTLE & COOKE, INC., DOLE FRESH FRUIT COMPANY, STANDARD FRUIT COMPANY, STANDARD FRUIT & STEAMSHIP COMPANY,

Petitioners.

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(JULY 29, 1991)

Before POLITZ, DAVIS and BARKSDALE, Circuit Judges.

PER CURIAM:

(✔) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it,

(Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

Rhesa Barksdale
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.